

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|---|---|-----------------------|
| ROLANDO DIAZ |) | |
| Claimant |) | |
| VS. |) | |
| |) | |
| UNITED PARCEL SERVICE |) | Docket Nos. 1,021,750 |
| Respondent |) | & 1,022,407 |
| AND |) | |
| |) | |
| LIBERTY MUTUAL INSURANCE COMPANY |) | |
| Insurance Carrier |) | |

ORDER

Respondent appeals the July 6, 2005 Order Nunc Pro Tunc in Docket No. 1,022,407, amending the July 5, 2005 preliminary hearing Order of Administrative Law Judge Thomas Klein. Claimant was awarded benefits in the form of temporary total disability compensation and medical treatment under the authorized care of Anthony G.A. Pollock, M.D., for the injuries suffered while employed with respondent.

ISSUES

1. Did claimant suffer accidental injury arising out of and in the course of his employment?
2. What is the relationship of claimant's neck injury claims to the date of accident alleged in this matter?
3. Does the Appeals Board have jurisdiction over this appeal?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds as follows:

This matter was originally brought before the Administrative Law Judge (ALJ) in Docket Nos. 1,022,407 and 1,022,408 for injuries suffered by claimant beginning December 24, 2003, and thereafter. In that litigation, claimant was represented by Attorney Stephen J. Jones of Wichita, Kansas. On February 16, 2005, claimant filed an

additional E-1 Application for Hearing with the Kansas Division of Workers Compensation, alleging a date of accident "each and every working day." That claim was assigned Docket No. 1,021,750. Claimant, at that time, was represented by Dale V. Slape of Wichita, Kansas. Shortly thereafter, the attorneys apparently discovered the ongoing conflict. Mr. Slape filed his Motion to Withdraw as claimant's attorney on May 12, 2005, with the ALJ granting that Motion on May 12, 2005. Mr. Jones then continued as claimant's attorney in all of the above listed actions. It is noted that Attorney Slape filed his attorney lien on May 12, 2005, as well.

Claimant filed a Motion to Consolidate Docket Nos. 1,021,750 and 1,022,407 on May 18, 2005. The ALJ in his June 23, 2005 Order consolidated Docket Nos. 1,022,407 and 1,021,750. The matter then proceeded to preliminary hearing before the ALJ on July 5, 2005. At the preliminary hearing, the ALJ announced that they were there for Docket No. 1,022,407, with no mention of Docket No. 1,021,750, even though the matters had been consolidated by order. Additionally, the Order and Order Nunc Pro Tunc issued by the ALJ from that preliminary hearing carried only Docket No. 1,022,407. The appeal by respondent from that Order carries Docket No. 1,021,750. The Board determines, based upon the Order for consolidation, that both Docket Nos. 1,022,407 and 1,021,750 were in dispute at that preliminary hearing and the record is amended to include both docket numbers in this ongoing litigation.

Claimant alleges accidental injury arising out of and in the course of his employment with respondent to his upper and lower back, neck, bilateral shoulders, bilateral upper extremities and bilateral knees. However, as noted on claimant's E-1, even though the E-1 form specifically requests beginning and ending dates if involved in a series of accidents, no beginning or ending dates were provided by claimant.

At the preliminary hearing of July 5, 2005, the parties agreed that the preliminary hearing transcript of May 5, 2005, would be included as part of the record for this litigation. At the preliminary hearing of May 5, 2005, claimant discussed a specific incident which occurred the evening before, on May 4, 2005, at which time claimant suffered additional injury to his low back. At that time, claimant testified that his low back popped while he was picking up a heavy box, with the pain in his back increasing significantly. Claimant advised his supervisor, Jerome, of the injury when his leg went numb, and his supervisors agreed to send him to the company doctor, Travis D. Hubin, D.O. As of the May 5, 2005 preliminary hearing, claimant had already been examined by Dr. Hubin and had been returned to work with respondent with specific restrictions, including no lifting in excess of 20 pounds and with specific restrictions regarding the number of times per hour claimant was allowed to lift and bend. Dr. Hubin's initial report indicated claimant suffered from a lumbar strain, with low back pain. Claimant was referred by Dr. Hubin to Anthony G.A. Pollock, M.D., an orthopedic surgeon, for ongoing care. Claimant argued that both Dr. Hubin and Dr. Pollock refused to provide medical care for any part of his body other than his low back. However, on cross-examination, claimant acknowledged that Dr. Hubin had, on at least one occasion, x-rayed his neck and the x-rays had come back normal.

The medical reports of Dr. Pollock fail to mention any upper back, upper extremity, neck or shoulder complaints until June 21, 2005, at which time he noted that claimant alleged pain in his thoracic area, with some neck pain and electrical sensation to his shoulders, particularly on the left side. Claimant also testified at preliminary hearing that Dr. Hubin had referred him for x-rays of his cervical spine, with the results being normal. However, no record of x-rays is included in the exhibits attached to the July 5, 2005 preliminary hearing transcript.

Respondent argued at preliminary hearing that claimant's neck problems were not related to the injury associated with his employment with respondent. The ALJ, in the Order Nunc Pro Tunc of July 6, 2005, authorized Dr. Pollock as the treating physician "for all treatment, tests and referrals, except referrals to rehabilitation hospitals."¹ The ALJ does not specifically state that Dr. Pollock is to provide treatment for any particular designated area of the body, but simply makes Dr. Pollock the authorized treating physician. If, as claimant testified, Dr. Pollock had already provided x-rays of the neck which came back normal, it would appear that this dispute has already been determined by Dr. Pollock, at least for the present.

Additionally, the Board notes that the accident alleged by claimant in this matter includes a substantial portion of claimant's entire body. However, the injury described by claimant from the May 4, 2005 incident involves only claimant's low back and lower extremities. There is no specific mention of the upper extremities in relation to that alleged injury. It is also noted that, in the E-1 associated with this claim, no specific date of accident is listed, even though the E-1 specifically asks for beginning and ending dates when alleging a series of accidents.

Respondent does not deny that claimant suffered accidental injury on or about May 4, 2005, and has voluntarily provided medical care through Dr. Hubin and Dr. Pollock for that alleged injury. The Board, rather than second guessing the ongoing medical treatment provided by Dr. Pollock, will affirm the ALJ's appointment of Dr. Pollock as the authorized treating physician for whatever treatment Dr. Pollock may deem appropriate under the circumstances. The Board finds it significant that, while Dr. Pollock rarely mentions claimant's neck and upper extremities, the medical evidence from Pedro A. Murati, M.D., attached to the May 5, 2005 preliminary hearing transcript, discusses a lumbar strain with radiculopathy, a cervical bulging disc with degenerative changes noted on an MRI, myofascial pain syndrome affecting claimant's shoulders bilaterally and his neck, with radicular symptoms from the neck pain. These symptoms, which precede the May 4, 2005 date of accident, may stem from a series of injuries suffered by claimant throughout his employment, beginning as early as December 2003. Based upon this record, the Board finds that claimant has proven by a preponderance of the credible evidence that he has suffered injury, including injury to his neck, upper back and upper

¹ Order Nunc Pro Tunc at 1 (July 6, 2005).

extremities, during his employment with respondent, with the injury date occurring through a series of accidents over a substantial period of time through May 4, 2005. In that regard, the Order of the Administrative Law Judge authorizing Dr. Pollock as the ongoing treating physician is affirmed.

Respondent further disputes claimant's entitlement to temporary total disability compensation from these injuries. Respondent argues claimant has been performing work as an electrician during the time in which he is alleging entitlement to temporary total disability compensation. This record does not support respondent's arguments. Moreover, that is not an issue over which the Board takes jurisdiction from a preliminary hearing.²

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order Nunc Pro Tunc of Administrative Law Judge Thomas Klein dated July 6, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 2005.

BOARD MEMBER

c: Stephen J. Jones, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
Dale V. Slape, Former Attorney for Claimant in Docket No. 1,021,750
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² See K.S.A. 44-534a and K.S.A. 2004 Supp. 44-551.